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No. 83-624

# In the
# Supreme Court of the United States.

OCTOBER TERM, 1983.

MASHPEE TRIBE, ET AL.,
PETITIONERS,

*v.*

JAMES G. WATT, ET AL.,
RESPONDENTS.

**Brief of Respondent Town of Mashpee in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

JAMES D. ST. CLAIR,
WILLIAM F. LEE,
DAVID H. ERICHSEN,
DONALD R. FREDERICO,
HALE AND DORR,
60 State Street,
Boston, Massachusetts 02109.
(617) 742-9100

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## Counterstatement of Question Presented for Review.

Whether the court of appeals properly affirmed the dismissal of an action commenced by plaintiffs who four years earlier had asserted the same claims to the same land against the same defendants and whose claims in that prior action were dismissed by entry of a final judgment on the merits?

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**Brief of Respondent Town of Mashpee in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

## Opinions and Judgments Below.

The opinion of the United States Court of Appeals for the First Circuit which is the subject of the petition is reported at 707 F.2d 23 (1st Cir. 1983). That decision affirmed a decision of the United States District Court for the District of Massachusetts reported at 542 F. Supp. 797 (D. Mass. 1982).

An earlier, but related, opinion and judgment of the United States Court of Appeals for the First Circuit is reported at 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979). That decision affirmed a judgment of the United States District Court for the District of Massachusetts reported at 447 F. Supp. 940 (D. Mass. 1978).

## Jurisdiction.

The order of the United States Court of Appeals for the First Circuit affirming the judgment of the district court was entered on May 23, 1983. On August 8, 1983, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 20, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## Counterstatement of the Case.

On August 26, 1976, the petitioner, the alleged Mashpee Tribe ("the petitioner"),[1] commenced an action in the United States District Court for the District of Massachusetts claiming title to essentially all of the land in the Town of Mashpee, Massachusetts, and a small portion of land in the adjoining Town of Sandwich, Massachusetts. The petitioner alleged that the Commonwealth of Massachusetts had authorized the alienation of the claimed land by the petitioner's predecessors in contravention of § 12 of the Indian Trade and Intercourse Act of 1834, now codified in part as 25 U.S.C. § 177 ("the Nonintercourse Act"); and that, consequently, the petitioner was entitled to immediate possession of that land and trespass damages.

Specifically, the petitioner contended that, in 1685, the General Court of the Plymouth Colony granted the claimed land to the petitioner's predecessor in interest subject to a restraint on alienation. *Mashpee Tribe* v. *Town of Mashpee*, 447 F. Supp. 940, 949 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.),

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[1] As used here, the word "petitioner" will refer collectively to the alleged Mashpee Tribe and its claimed members.

*cert. denied*, 444 U.S. 866 (1979) ("*Mashpee I*"). In 1723, this land and its residents were organized as a propriety and, in 1834, as the District of Mashpee. 447 F. Supp. at 944-945. In both its propriety and district forms, the land in Mashpee remained subject to restraints on alienation imposed by the Plymouth Colony and later by the Massachusetts General Court. 447 F. Supp. at 945-946. In 1842, the Massachusetts General Court partitioned and alloted the land in the district to the individual residents subject again, however, to a continued restraint on alienation to non-residents. 447 F. Supp. at 945. In 1869 and 1870, the Massachusetts General Court eliminated its restraint on the conveyance of the previously allotted land to non-residents of Mashpee and incorporated Mashpee as a town. It is these 1869 and 1870 legislative acts which the petitioner asserted violated the Nonintercourse Act.

*Mashpee I* was submitted to a jury after forty days of trial on the issue whether the petitioner and its claimed predecessors were an Indian tribe within the meaning of the Nonintercourse Act on the date *Mashpee I* was commenced and on certain other relevant dates. The jury found as a matter of fact that the group was an Indian tribe on March 31, 1834, when the District of Mashpee was established, and on March 3, 1842, the date on which there was a formal partition of land in the District. However, the jury found that the group was not an Indian tribe on July 22, 1790, the date of the enactment of the first version of the Nonintercourse Act; on June 23, 1869, the date on which the Massachusetts General Court removed all restraints on the alienation of Indian land in Massachusetts; on May 28, 1870, the date on which the Town of Mashpee was incorporated; and, on August 26, 1976, the date of commencement of *Mashpee I*. 447 F. Supp. at 943. Based upon the jury's special verdicts, the *Mashpee I* court found that the petitioner had not established the tribal status element of a Nonintercourse Act claim, and dismissed the petitioner's claim on

the merits. On appeal, the United States Court of Appeals for the First Circuit affirmed. *Mashpee Tribe* v. *New Seabury Corp.*, *supra*. On October 1, 1979, this Court denied the petitioner's first petition for a writ of certiorari. 444 U.S. 866 (1979).

On December 18, 1981, the petitioner commenced a second action, again challenging the alienation of the claimed land subsequent to the 1869 and 1870 legislative acts of the Commonwealth of Massachusetts.[2] Because *Mashpee I* had conclusively determined that the petitioner's claimed predecessors were not an Indian tribe in 1869 or 1870, that the petitioner had not been an Indian tribe on the date *Mashpee I* was commenced and, consequently, that the petitioner could not state a claim under the Nonintercourse Act, the respondent Town of Mashpee moved to dismiss this second action on the basis of the doctrines of res judicata and collateral estoppel. The respondent also moved to dismiss the claims of the individual plaintiffs for failure to state a claim upon which relief could be granted.

On June 30, 1982, the district court dismissed the second action against all defendants except certain United States officials. *Mashpee Tribe* v. *Watt*, 542 F. Supp. 797 (D. Mass. 1982) ("*Mashpee II*") (Pet. App. B). The petitioner again appealed to the United States Court of Appeals for the First Circuit. On May 23, 1983, that court affirmed, specifically holding that "this effort to relitigate the tribe's claim is barred by elementary principles of res judicata." *Mashpee Tribe* v. *Watt*, 707 F.2d 23, 24 (1st Cir. 1983) (Pet. App. A).

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[2] The petitioner now suggests that it also alleged the 1842 act of the Massachusetts General Court to be violative of the Nonintercourse Act (Pet. 3). Before the lower courts, however, the petitioner challenged only the 1869 and 1870 legislative acts. *Mashpee Tribe* v. *Watt*, *supra*, 542 F. Supp. at 799 n.2.

After *Mashpee II* had been dismissed by the district court but while the petitioner's appeal of that decision was pending before the court of appeals, the petitioner filed in *Mashpee I* a "Motion to Vacate Judgment and to Enter Substitute Judgment Nunc Pro Tunc." By that motion, the petitioner sought to vacate the 1979 judgment of the court of appeals in *Mashpee I* and to substitute a judgment determining the petitioner to be an Indian tribe within the meaning of the Nonintercourse Act despite the jury findings. That motion and the supporting memorandum offered by the petitioner were considered by the same panel of judges of the court of appeals which had decided *Mashpee I*. After reviewing the motion and memorandum, the court of appeals denied the motion on the grounds that there was "no justification for recalling mandate and reconsidering these cases." On October 3, 1983, this Court denied the petitioner's second petition for writ of certiorari. *Mashpee Tribe* v. *New Seabury Corp.*, ____ U.S. ____, 52 U.S.L.W. 3249 (1983).

## Summary of Argument.

The decisions of the court of appeals and the district court dismissing the petitioner's effort to relitigate claims which were dismissed four years earlier by entry of a final judgment on the merits do not conflict with any decision of this Court, any other court of appeals or any state court of final resort. The challenged decisions specifically do not conflict with any decision of this Court holding that only a judgment on the merits will bar a subsequent action, or any decision of this Court defining the parties to whom and the claims to which the doctrines of res judicata and collateral estoppel apply. Nor do the decisions below ignore or conflict with any executive

branch action. Instead, those decisions merely apply elementary principles of res judicata to the particular facts of this case and, therefore, do not raise issues sufficiently profound to justify review by certiorari.

## Argument.

### The Dismissal of the Petitioner's Effort to Relitigate its Previously Rejected Claims Raises No Issues of Importance Beyond this Case and Therefore does Not Warrant Review by Certiorari.

The challenged decision of the court of appeals does not conflict with any decision of this Court, Sup. Ct. R. 17.1(c); conflict with any decision of a state court of last resort, Sup. Ct. R. 17.1(a); or result in a conflict among the courts of appeals, Sup. Ct. R. 17.1(a). It does not decide any important issue of statutory or constitutional law not previously settled by this Court or involve any crucial procedural question. Nor does the record even remotely indicate that the court of appeals has so far departed from "the accepted and usual course of judicial proceedings . . . as to call for exercise of this Court's power of supervision." *Id.*

Instead, the decision in issue merely applies long and well established principles of res judicata. Rather than raising issues sufficiently profound and far reaching to justify review by certiorari, the petitioner's contentions represent no more than a litigant's dissatisfaction with prior judgments which were the result of extended and thorough litigation, which were correct when rendered and are correct today, and which twice have been the subject of unsuccessful petitions for certiorari. This petition thus raises no question of importance

beyond the factual context of this case but, rather, merely quarrels with the unwillingness of the court of appeals to reopen issues and arguments already finally resolved.

In its effort to create some colorable basis for issuance of a writ of certiorari, the petitioner makes four arguments. First, it contends that the court of appeals' dismissal of *Mashpee II* somehow conflicts with decisions of this Court holding that only a judgment on the merits will bar a subsequent action (Pet. 6-7, citing and relying upon *Hughes* v. *United States*, 71 U.S. (4 Wall.) 232 (1866); *Costello* v. *United States*, 365 U.S. 265 (1961); *Flast* v. *Cohen*, 392 U.S. 83 (1968); and *Warth* v. *Seldin*, 422 U.S. 490 (1975)). Second, the petitioner asserts that *Mashpee II* involves "more land, additional parties and new legal theories" (Pet. 10), and therefore concludes that the decision of the court of appeals conflicts with decisions of this Court and other courts defining the doctrines of res judicata and collateral estoppel (Pet. 9-11, 13). Third, the petitioner asserts that the court of appeals' dismissal on the grounds of res judicata conflicts with a decision of this Court authorizing relitigation of claims (Pet. 11, citing *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982)). Finally, the petitioner appears to contend that the court of appeals' decision ignores executive branch action affording the petitioner "nonterminated, politically recognized federal" Indian status (Pet. 7-9). None of these four arguments has merit.

A. *Because the District Court Dismissed* Mashpee I *on the Merits of the Claim and Not for Lack of Standing, There is No Conflict Between* Mashpee II *and Any Decision of This Court.*

The petitioner argues that the decision below conflicts with decisions of this Court holding that a dismissal for lack of standing is not on the merits. Specifically, the petitioner con-

tends that *Mashpee I* was dismissed for lack of standing and therefore concludes that the *Mashpee II* courts erroneously held that the doctrines of res judicata and collateral estoppel barred the present claims. Because *Mashpee I* was dismissed not for lack of standing but on the merits of the claim, the petitioner's argument is misplaced.

The petitioner bases its argument on the language of the district court's order in *Mashpee I* "that this action be DISMISSED on the merits, the plaintiff not having established its standing to bring suit as an Indian tribe." 447 F. Supp. at 950. The petitioner chooses simultaneously to focus on the word "standing" in the court's order and to disregard the court's designation of the dismissal as being "on the merits." By wrenching the language of the dismissal order out of context, the petitioner entirely misconstrues the nature of the holding in *Mashpee I* and the subtle but definite distinction between the constitutional and prudential doctrine of standing and tribal status as an element of a cause of action under the Nonintercourse Act.

The doctrine of standing, as recently defined by this Court, "subsumes a blend of constitutional requirements and prudential considerations." *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). The district court in *Mashpee I* was not concerned with the doctrine of standing, either in its constitutional or prudential dimension, and no discussion of the doctrine can be found in any *Mashpee I* opinion. It was clear beyond dispute in *Mashpee I* that the complaint asserted an actual injury as a direct result of allegedly illegal conduct, that the injury could fairly be traced to the challenged actions of the Massachusetts Legislature, and that it was likely to be redressed by a favorable decision. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State*, *supra*, 454 U.S. at 472. It was also clear that the peti-

tioner, which alleged it was the Mashpee Tribe, was attempting to assert its own rights and not the rights of a third party, that the dispute was not an abstract question or generalized grievance, and that the complaint's allegations of invalid conveyances of tribal land fell within the zone of interests protected by the Nonintercourse Act. *See id.*, 454 U.S. at 474.

Because standing was not in issue, the district court in *Mashpee I* proceeded directly to a determination of the merits of the Nonintercourse Act claim. It did so in two steps. First, the court addressed a motion to dismiss for failure to state a claim. *See Mashpee Tribe* v. *New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977). The defendant Town of Mashpee argued in that motion that the petitioner had inadequately alleged tribal status because it had not alleged federal recognition as a tribe. The court, citing *Narragansett Tribe of Indians* v. *Southern R.I. Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976) set forth "[t]he elements of a prima facie case" under the Nonintercourse Act:

> . . . plaintiff must show that:
>
> 1) it is or represents an Indian "tribe" within the meaning of the Act;
>
> 2) the parcels of land at issue herein are covered by the Act as tribal land;
>
> 3) the United States has never consented to the alienation of the tribal land;
>
> 4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.

427 F. Supp. at 902. The district court held at that juncture in the proceedings that the complaint stated a claim under the Nonintercourse Act because federal recognition was not essen-

tial to establish the first element of a cause of action under the Act. *Id.* The court concluded: "The Tribe has then sufficiently alleged its status. Whether it meets the criteria for protection under the Nonintercourse Act is a question of fact which is susceptible of proof like any other." 427 F. Supp. at 903.

In keeping with its focus on the elements of a claim under the Nonintercourse Act, and again without reference to the constitutional or prudential doctrine of standing, the district court conducted a jury trial on the merits to determine whether the petitioner could satisfy the first element of its prima facie case. After forty days of trial, the jury rendered a verdict concluding that the petitioner did not constitute a tribe within the meaning of the Act on certain crucial dates, including 1869 and 1870. 447 F. Supp. at 943. The defendants moved "for judgment of dismissal on the merits based on the jury's answer." *Id.* Explicitly relying on the jury's answers to the special interrogatories, the district court ordered "that this action be DISMISSED on the merits." 447 F. Supp. at 950. Without any reference to this Court's cases applying the constitutional or prudential doctrine of standing, the court of appeals affirmed the dismissal of *Mashpee I* on the merits. 592 F.2d at 579, 581.[3]

If the *Mashpee I* opinions left any doubt as to the grounds for that dismissal, the opinions of the district court and court of appeals in this case conclusively resolve such doubt. As the district court explained, the plaintiff in *Mashpee I* met both the three-prong test of Article III standing and the prudential test described above. 542 F. Supp. at 800 (Pet. App. B4).

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[3] Although the court of appeals, like the district court, used the word "standing," there is no indication in its opinion that it was using the word to describe the standing doctrine as a term of art. Rather, both courts appear to have used the phrase simply as a short-hand method of referring to the tribal status element of a cause of action under the Nonintercourse Act.

The court further clarified that it had dismissed *Mashpee I* not for lack of standing, but because the *Mashpee I* plaintiff failed to establish an element of its substantive claim. *Id.* The *Mashpee II* court of appeals agreed. 707 F.2d at 24 (Pet. App. A2).

Because the *Mashpee I* decision was on the merits of the petitioner's Nonintercourse Act claim, it does not conflict with this Court's cases denying res judicata effect to claims not dismissed on the merits. The very passage upon which the petitioner relies explains that standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968) (Pet. 7). The issue adjudicated in *Mashpee I* as an element of the petitioner's claim on the merits was petitioner's continuous tribal status. Because the district court and court of appeals have determined unequivocally that *Mashpee I* was decided on the merits, there is no possible conflict with any decision of this Court.

B. *Because the Individual Plaintiffs in* Mashpee II *Were in Privity with the Plaintiff in* Mashpee I, *the Decisions Below do Not Conflict with Any Decision of this Court.*

The petitioner argues that the doctrines of res judicata and collateral estoppel should not have been applied to bar the claims of the individual plaintiffs in *Mashpee II* because they were not formally named as parties in *Mashpee I*. Because the individual plaintiffs in *Mashpee II* participated in *Mashpee I*, have interests identical to the *Mashpee I* plaintiff and assert identical legal claims, their individual claims also are barred by res judicata and the decisions below so holding are entirely consistent with the decisions of this Court.[4]

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[4] The petitioner also argues that res judicata should not bar its claims because this case involves additional defendants, land and legal theories. As

The court of appeals held that "the interests of the tribe and its members were fully and fairly represented." 707 F.2d at 24 (Pet. App. A2). It thus expressly adhered to this Court's statement in *Hansberry* v. *Lee*, 311 U.S. 32, 41-43 (1940), that judgments are binding against persons not parties who have interests in common with the parties which were adequately represented in prior proceedings. Moreover, because the court of appeals held that the individual plaintiffs in *Mashpee II* were all in privity with the *Mashpee I* plaintiff, its holding was fully consistent with this Court's repeated definition of res judicata as a doctrine binding parties and their privies. *See, e.g., Nevada* v. *United States*, ____ U.S. ____, 51 U.S.L.W. 4974, 4980 (1983) ("a prior judgment will bar the 'parties' to the earlier lawsuit 'and those in privity with them,' from relitigating the cause of action") (citing *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1876)); *Montana* v. *United States*, 440 U.S. 147, 153 (1979) ("a final judgment on the merits bars further claims by parties or their privies based on the same cause of action"); *Hughes* v. *United States*, 71 U.S. (4 Wall.) 232 (1866).[5]

This Court appears to recognize at least three categories of privies bound by a prior judgment: those who control an action although not parties to it; those whose interests are represented by a party to the action; and successors in interest. *See Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329 &

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this Court has repeatedly held, the doctrine of res judicata bars parties to a prior action from litigating in a subsequent action not only issues that actually were raised, but also issues that could have been raised in the prior suit based upon the same cause of action. *E.g., Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979) (dicta); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940).

[5]Indeed, the petitioner appears to concede that a prior judgment will operate against those in privity with parties to that litigation (Pet. 9 n.1).

n.19 (1955) (citing Restatement of Judgments § 83, comment a.) This Court has applied the second category in holding that an Indian tribe whose interests are represented by the United States in a prior proceeding is bound by the judgment in that proceeding, and that individual Indians are bound by a judgment in an action brought by the United States on their behalf. *Nevada* v. *United States*, *supra*, 51 U.S.L.W. at 4981; *Heckman* v. *United States*, 224 U.S. 413 (1912). It was entirely consistent with these holdings for the court of appeals to determine that the individual *Mashpee II* plaintiffs, who participated in and exercised control over the *Mashpee I* litigation, and whose interests were represented by the organization to which they all claimed to belong, were bound by the *Mashpee I* judgment.[6] *See also United States* v. *Kabinto*, 456 F.2d 1087 (9th Cir.), *cert. denied*, 409 U.S. 842 (1972) (individual Indians bound by judgment in prior proceeding brought by tribe.)[7]

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[6] By their own admission, the individual plaintiffs all are members of the organization which brought suit in *Mashpee I*. At least ten of the individual plaintiffs in the present action, including the claimed tribal leaders, participated as witnesses in the trial of *Mashpee I*. In addition, at least twenty-one of the present plaintiffs provided deposition testimony in *Mashpee I*. It is clear therefore, that the individual plaintiffs in the present action had notice of *Mashpee I*, were allowed to participate in, and thereby exercise control over, the earlier litigation, and allowed the association of which they claim to be members to represent their interests in that litigation.

[7] The petitioners claim that the decision of the court of appeals is inconsistent with this Court's holding in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971). In *Blonder-Tongue*, this Court simply affirmed the defensive use of collateral estoppel, and did not address the issue of what persons are privies bound by a prior judgment. In fact, in defining the doctrine of mutuality of estoppel, this Court in *Blonder-Tongue* recognized that collateral estoppel applies both to parties and their privies. 402 U.S. at 320. Thus, the court of appeals' holding in this case is entirely consistent with *Blonder-Tongue*.

### C. *No Decision of this Court Authorizes Relitigation of the Petitioner's Dismissed Claims.*

The petitioner also contends that the decision of the court of appeals conflicts with "this Court's policy . . . permitting relitigation" when a party "can demonstrate [a] serious defect" in the earlier litigation (Pet. 11). For this extraordinary proposition the petitioner cites only *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982). In *Kremer*, this Court held that a federal court in an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, was required to give preclusive effect to a state court decision affirming a state administrative agency's rejection of an employment discrimination claim. In so holding, the Court specifically rejected a contention that the state proceedings were so "fundamentally flawed" that the doctrines of collateral estoppel and res judicata should not apply. *Id.* at 480. Rather than articulating a policy permitting multiple litigation of a single claim, the Court confirmed the well established principle that a party who has had a "full and fair opportunity" to litigate a claim is precluded from relitigation.

There can be little doubt that the petitioner had the opportunity to fully and fairly litigate its claims in *Mashpee I*. Discovery was extensive and the trial consumed more than forty days. After the district court ordered judgment for the defendants on the basis of the jury's verdicts, an appeal was taken to the First Circuit Court of Appeals and that court affirmed. Ultimately, this Court denied a petition for certiorari. Thus, the petitioner had ample opportunity to assert and fully litigate any theories or facts before three courts and its claims, as the court of appeals held in *Mashpee II*, were "fairly litigated." 707 F.2d at 24.

The petitioner offers two "procedural defects" in *Mashpee I* which, in its view, entitle it to another opportunity to litigate

its land claims. First, the petitioner argues that its trial counsel in *Mashpee I* erred in permitting the issue of tribal existence within the meaning of the Nonintercourse Act to be determined by a jury. This tactical decision "leads [petitioner] to question the quality of [its] legal representation in *Mashpee I*" (Pet. 11-12). This Court, however, recently has held in an analogous context that allegations by an Indian tribe of inadequate representation in a prior proceeding do not limit the preclusive effects of the doctrine of res judicata. *Nevada v. United States*, *supra*, 51 U.S.L.W. at 4983 n.16.

Second, the petitioner quotes, without any reference, an alleged statement by the *Mashpee I* district court and asserts that that quotation evidences a bias which fatally flawed *Mashpee I*. The absence of any transcript reference to the alleged statement is telling; indeed, the respondent has been unable to locate that quotation in any part of the *Mashpee I* record. In any event, the petitioner had ample opportunity to make these allegations in *Mashpee I* and, in fact, asserted its bias claims in the form of motions to disqualify before the district court and court of appeals in *Mashpee II*.[8] Both courts, after thoroughly examining the petitioner's factual allegations, rejected the petitioner's claims. Consequently, the petitioner's totally unsupported and twice rejected allegations of bias provide no basis for abandoning the preclusive effect of res judicata.

The present petition is no more than another in a series of attempts to circumvent the salutary doctrine of res judicata by attacking a judgment rendered four years ago. Both in its filing of *Mashpee II* and its efforts to vacate the judgment in *Mashpee I*, the petitioner has demonstrated a consistent disregard for the policies of finality and repose which are "essential

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[8] A memorandum and order of the First Circuit Court of Appeals dated September 8, 1982 rejecting the petitioner's claim of judicial bias is set forth as Appendix 1.

to the maintenance of social order." *Nevada* v. *United States*, *supra*, 51 U.S.L.W. at 4979 (quoting *Southern Pacific Railroad* v. *United States*, 168 U.S. 1, 49 (1897)). Those policies are of particular importance where, as here, the very pendency of the action calls into question the title of thousands of innocent landowners to thousands of acres of land. *Nevada* v. *United States*, *supra*, 51 U.S.L.W. at 4979 n.10 ("The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water"). These claims, now the subject of litigation for more than seven years, must once and for all be resolved with the denial of this third petition for a writ of certiorari.

D. *The Decision of the Court of Appeals Does Not Conflict with Any Pronouncement of the Executive or Legislative Branches.*

The petitioner repeatedly and disingenously alleges that it is an Indian tribe "federally recognized" by the executive and legislative departments of the United States (Pet. 3, 7-9, 10). This "federal recognition," the petitioner contends, is binding on the courts and in conflict with the decision of the court of appeals. As the petitioner is well aware, it has not qualified for federal recognition as an Indian tribe under the regulations promulgated by the Department of the Interior. 25 C.F.R. Part 54 (Procedures for Establishing That an American Indian Group Exists as an Indian Tribe). Nor has it been included on the official listing of tribal entities having a government to government relationship with the United States. 44 Fed. Reg. 7234-7237 (February 6, 1979). Indeed, in their answer in *Mashpee II*, the federal defendants, all from the executive branch, specifically stated "that the United States has never acknowledged the group as an Indian tribe." These unequivocal pronouncements of the executive branch that the petitioner

is not an Indian tribe for federal purposes are, of course, entitled to great weight. *United States* v. *Sandoval*, 231 U.S. 28, 47 (1913). More important, they do not conflict in any way with the decision of the court of appeals.

## Conclusion.

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES D. ST. CLAIR,
WILLIAM F. LEE,
DAVID H. ERICHSEN,
DONALD R. FREDERICO,
HALE AND DORR,
60 State Street,
Boston, Massachusetts 02109.
(617) 742-9100

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 82-1562.

MASHPEE TRIBE, ET AL.,
Plaintiffs, Appellants,

v.

JAMES G. WATT, ET AL.,
Defendants, Appellees.

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BEFORE COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

MEMORANDUM AND ORDER

Entered September 8, 1982

Plaintiffs, describing themselves as members-descendants of the Mashpee Tribe and seeking, inter alia, the recovery of possession of lands embracing the Town of Mashpee, have appealed from a constructive denial of preliminary injunctive relief. They seek various relief pending appeal including the disqualification of Judge Skinner from presiding in their action. We treat plaintiffs' various motions addressed to the disqualification issue as a petition for a writ of mandamus, *see In re United States*, 666 F.2d 690, 694 (1st Cir. 1981); *United States* v. *Parrilla Bonilla*, 626 F.2d 177, 179 n.2 (1st Cir. 1980)

(refusals to recuse reviewable via petition for writ of mandamus), and deny the petition.

As a preliminary matter, plaintiffs, relying on *Hampton* v. *Chicago*, 643 F.2d 478, 479 (7th Cir. 1981), seek to disqualify defendants from participating in any appellate proceedings addressed to Judge Skinner's disqualification. Since, unlike *Hampton*, we are not here concerned with the appealability of a district court's grant of a motion to recuse, we need not decide whether we would follow *Hampton*. Rather, in view of defendants' substantial res judicata and collateral estoppel defenses — defenses which Judge Skinner, who presided over the earlier 40 day trial, was in a position to evaluate more readily than would another judge — the present situation is more analogous to *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961), where we concluded the party opposing disqualification had "an immediate and legitimate interest to protect" and permitted said party to participate. *Id.*, 384 n.4.

Relying on 28 U.S.C. § 455(a), 28 U.S.C. § 144, 28 U.S.C. § 47, and due process guaranties of fundamental fairness and an impartial tribunal, plaintiffs contend Judge Skinner erred in refusing to recuse himself from presiding in the present action.

Several affidavits were filed below in support of the recusal motion. The affidavits of plaintiffs' counsel, Attorney Hahn, alleged Judge Skinner "has a personal bias, prejudice and predisposition or appearance of same, against plaintiffs' view of the principal issues herein, and/or a personal bias, prejudice and predisposition or appearance of same in favor of the . . . non-Indians, and in favor of their view of the principal issues. . . ." As grounds for his belief, he referred to the following:

(a) Judge Skinner's statement, during a hearing on a motion to dismiss in the case of *Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979), to the effect that he under-

stood but disagreed with the Indian plaintiffs view of the law and therefore felt oral argument would not be fruitful;

(b) Judge Skinner's observation during the trial in *Mashpee Tribe* v. *Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (Mashpee I) of "one character who has his head shaved with only a scalp plate";

(c) a perceived difference in the handling of Indian and non-Indian potential jurors during the voir dire in *Mashpee I*;

(d) Judge Skinner's charge in *Mashpee I* concerning burden of proof and his remarks to counsel raising the constitutionality, under certain circumstances, of upsetting land transfers made 150 years ago;

(e) Judge Skinner's construction of 25 U.S.C. § 177 as requiring a tribe to "demonstrate a definable organization before it can qualify for the extraordinary remedy of the total voiding of land titles acquired in good faith and without fraud";

(f) Judge Skinner's understanding of the term "reservation," as manifested in his questioning of a *Mashpee I* witness, which understanding, plaintiffs say, is contrary to the Supreme Court's test of "Indian Country";

(g) a remark concerning Massachusetts' release of entailment in 1842;

(h) Judge Skinner's submission of the question of tribal existence to the jury in *Mashpee I*.

Chief Drifting Goose, a plaintiff, alleged by affidavit that Judge Skinner "has a personal bias, prejudice and predisposi-

tion or appearance of same, against me individually and as I represent all Indians and Tribes. . ." and as grounds therefore pointed, in addition to matters covered in the Hahn affidavit, to

(i) Judge Skinner's decision, adverse to the Indians, in *Mashpee I* and *Epps* v. *Andrus*;
(j) Judge Skinner's alleged remarks during *Mashpee I*, the "gist" of which, affiant says, was, "The ramifications are very strong here. To follow the law would be too harsh on the non-Indians living in Mashpee";
(k) a petition, signed by numerous persons who described themselves as "members of the Community of Mashpee (Tribe of Indians) of the Wampanoag Nation," complaining of Judge Skinner's filling the courtroom in *Mashpee I* with federal marshals, and stating they believed Judge Skinner was prejudiced;
(l) a petition from "members of the Aquinnah or Gay Head (Tribe of Indians)" calling for the recusal of Judge Skinner because of his prejudice against Indians.

Plaintiffs point to several further incidents occurring more recently which, they claim, indicate Judge Skinner should be disqualified:

(m) Judge Skinner's July 14, 1982 decision to schedule a July pre-trial conference in this and other Indian land cases when in February Judge Skinner had indicated he would stay further proceedings until the recusal issue had been resolved on appeal;
(n) various of Judge Skinner's comments which plaintiffs claim embody legal errors.

A. *28 U.S.C. § 455(a)*[1]

The standard of disqualification under 28 U.S.C. § 455(a) is an objective one: "Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in [§ 455(a)] should be read to warrant transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial." *United States* v. *Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977), *quoting from* H. Rep. No. 1453, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351, 6355 (emphasis in original). The proper test is "whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion . . . but rather in the mind of the reasonable," objective, and knowledgeable person. *United States* v. *Cowden*, 545 F.2d at 265; *In re United States*, 666 F.2d 690, 694, 695 (1st Cir. 1981) (situation to be viewed through eyes of objective and knowledgeable person). Thus, the fact that many Indians, as evidenced by the petitions filed, may sincerely believe Judge Skinner is biased is not sufficient to require recusal. *Cf. In re United States*, 666 F.2d at 694-695 (that a number of persons or the media have called for recusal is not enough).

To the extent plaintiffs' complaint is that Judge Skinner interprets the law differently from them or that he has participated in cases raising related issues or involving the same parties, plaintiffs have not stated a sufficient basis for disqualification. *United States* v. *Cepeda Penes*, 577 F.2d 754, 758 (1st Cir. 1978) (mere disagreement over the state of the law on

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[1] 28 U.S.C. § 455(a) reads, in material part,

"Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

any given point is not a ground for disqualification); *United States* v. *Cowden*, 545 F.2d at 265-266 (judge who has presided in a related or companion case not required to withdraw). While plaintiffs disagree with rulings made during and the result reached in *Mashpee I* and *Epps*, the judgments in both were affirmed on appeal, see *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979); *Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979), and, though plaintiffs have isolated from their context a number of statements Judge Skinner has made, plaintiffs have not shown he has purposely disregarded clearly settled legal principles brought to his attention.

None of Judge Skinner's complained of statements, conduct, or rulings demonstrate a personal animus or bias. That Judge Skinner noticed a head shaven but for a scalp plate — a hairstyle not commonly encountered in courtrooms today — denotes no prejudice. That he failed to disqualify a non-Indian juror who at one point expressed doubts about her ability to be impartial but later stated she felt she would base her decision on the evidence, but disqualified an "Indian" juror (a juror whose great grandfather was a Penobscot) who had discussed the matter with relatives and who responded during voir dire that her relationship "possibly" would effect her ability to be impartial does not establish bias. As Judge Skinner explained, his decision was not based merely on the words the jurors used, but on their whole demeanor.[2] Depending on the intonation, the word "possibly" can express a range of likelihood from remote to near certainty, and these

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[2] The analysis of the allegations made in the affidavits of bias is committed in the first instance to the trial court. *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981). Here, Judge Skinner indicated the non-Indian juror had nodded her head, apparently in a positive manner, while responding to the judge's query concerning her partiality. Plaintiffs' counsel did not dispute the judge's recollection of the juror's demeanor.

intonations are not beyond the trial court's evaluation. Nor does the presence of marshals during such a highly publicized trial as *Mashpee I* indicate a bias in favor of or against any party.

B. *28 U.S.C. § 144*[3]

Under 28 U.S.C. § 144, bias, to be disqualifying, must be personal and stem from an extrajudicial source. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States* v. *Serrano*, 607 F.2d 1145, 1150 (5th Cir. 1979), *cert. denied*, 445 U.S. 965 (1980). Here, Judge Skinner's complained of statements and actions arose out of judicial proceedings, and none are indicative of bias.

C. *28 U.S.C. § 47*[4]

This statute is irrelevant.

D. *Due Process*

As plaintiffs' allegations give rise to no reason to believe Judge Skinner is biased or that he will fail to apply the law regardless what his personal views of the wisdom of the applicable law may be, plaintiffs' invocation of due process concepts

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[3] 28 U.S.C. § 144 reads

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists . . . [and] shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

[4] 28 U.S.C. § 47 reads

> "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

of an impartial tribunal and fundamental fairness, *see, e.g., Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980), adds nothing, in the circumstances of this case, to plaintiffs' statutorily based recusal claims.

Consequently, we find no error in Judge Skinner's refusal to recuse himself, and we deny plaintiffs' motion to stay further proceedings in the district court.

We deal briefly with plaintiffs' other requests for relief pending appeal. As for plaintiffs' motion for preliminary injunctive relief pending appeal, plaintiffs have demonstrated neither a sufficient likelihood of irreparable harm, contrast *Coalition for Basic Human Needs* v. *King*, 654 F.2d 838 (1st Cir. 1981), nor a sufficient likelihood of prevailing on the merits, *see Conservation Law Foundation of New England Inc.* v. *Andrus*, 617 F.2d 296, 298 (1st Cir. 1979), to warrant the sweeping interim injunctive relief sought. Nor is there an adequate basis for granting plaintiffs' motion pending appeal to disqualify counsel from appearing on behalf of the Town of Mashpee or the county defendants. The Town has the power to employ legal counsel. Mass. G.L. c. 40, § 5 (16A), and cases on which plaintiffs rely such as *Piccirilli Bros.* v. *Lewis*, 282 Pa. 328, 127 A. 832 (1925); *Wade* v. *Mississippi Cooperative Extension Service*, 392 F. Supp. 229 (N.D. Miss. 1975); *Secretary of Administration and Finance* v. *Attorney General*, 367 Mass. 154, 326 N.E.2d 334 (1975); and *Darling Apartment Co.* v. *Springer*, 25 Del. Ch. 420, 22 A.2d 397 (1941); where the respective state attorney generals — the persons in whom control of state litigation was vested — opposed private representation of state agencies or officials are inapposite.

Remaining is the motion filed by certain nonparties requesting this court summarily to deny the "Plaintiffs, Appellants Motion Pending Appeal for Preliminary Restraining Orders, Disqualification of Hon. W.J. Skinner, and Disqualification of Certain Counsel." As we have denied all of plaintiffs' re-

quested relief, we need not determine whether the nonparties have standing to move for summary disposition.

*Plaintiffs' motions for injunctive relief, to disqualify Judge Skinner, to disqualify counsel, and to stay district court proceedings are denied.*

By the Court:

/s/ Dana H. Gallup
Clerk.